

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 May 2018

**Public Authority:** Department of Health and Social Care (DHSC)

**Address:** 39 Victoria Street

London

SW1H 0EU

### **Decision (including any steps ordered)**

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1. The complainant originally made a request to what was then the Department of Health for information relating to the use of the NHS logo by the Vote Leave Campaign in the run up to the referendum on the UK's membership of the European Union. His original request was refused, but he later resubmitted that request as he considered it possible that with the passage of time the sensitivity of the information may have declined. When making this new request he also requested all the information held about the Department's handling of his original request. In response to this new request a limited amount of information was disclosed to the complainant. Ultimately however section 36 – prejudice to the conduct of public affairs was applied to all the remaining information, section 42 – legal professional privilege was also applied to a significant amount of this information, with sections 41 – information provided in confidence, and section 40 – personal information applied to a limited amount of the withheld information.
2. The Commissioner's decision is that the DHSC has correctly withheld the majority of the information under a combination of sections 36(2)(b) and 42. The exemption provided by section 36(2)(c) cannot be relied on in the public interest. Section 40 does apply in respect of the personal data of junior officials. However there is a very limited amount of information which is not exempt under any of these exemptions, and to which section 41 has not been applied. This information has been identified in a confidential annex supplied exclusively to the DHSC. The public authority has also breached section 10 in that it failed to respond to the request within the statutory time limit.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information identified in the confidential annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 26 June 2016, the complainant wrote to the Department to raise concerns over the use of the NHS logo by the Vote Leave Campaign in some of the leaflets it was distributing. He concluded by making the following request:

" ... Please provide the information held by the DH in respect of the use of the NHS logo in this material This information will be located within copies of communications between DH and Vote Leave, along with records of meetings and telephone calls.

Please also provide copies of any related communication between the DH and any other public body including the Advertising Standards Agency or Electoral Commission."

6. This, the original request, was refused under various exemptions and the refusal was then the subject of an internal review. As a result of that a very limited amount of information was disclosed on 5 October 2016.
7. Recognising that that internal review had been obliged to consider the circumstances that existed at the time the original request was made, the complainant decided to make a fresh request in the expectation that, with the passage of time, the sensitivity of the information would have waned and the public interest may now favour disclosure. On the 7 October 2016 he therefore made a fresh request in the following terms:

"I am writing to resubmit my request in the same terms now i.e.

Please provide the information held by the DH in respect of the use of the NHS logo in this material This information will be located within copies of communications between DH and Vote Leave, along with records of meetings and telephone calls.

Please also provide copies of any related communication between the DH and any other public body including the Advertising Standards Agency or Electoral Commission.?"

.... Additionally, given the passage of substantial time, information contained in new material that DH has accrued since my initial request falls under the terms of this new enquiry. This new information will include material generated as a consequence of my earlier enquiry. As such, a component of this request, now, might be described as a meta-request?\*

This request includes communications that are wholly internal to DH as well as external communications with Vote Leaver, NHS England and any other external party. This will include the third parties to which [name of junior civil servant] of your office referred in his email to me of 12 September 2016.”

8. On 7 December 2016 the Department refused the first part of the request under section 14(2) – repeat request, and refused the second part of the request citing the exemptions provided by section 36(2)(b) and (c)- prejudice to conduct of public affairs, section 42 – legal professional privilege and section 43 – prejudice to commercial interests.
9. The complainant asked the department to conduct an internal review of that decision on 17 January 2017. The internal review was concluded on 1 June 2017 on which date the Department wrote to the complainant explaining that it no longer relied on section 14(2) to refuse any part of the request. However it now refused the entire request under a combination of the exemptions provided sections 36, 42 and 43.
10. During the course of Commissioner’s investigation the Department also claimed that some of the information was exempt under section 41 – information provided in confidence and section 40 – personal information. It did however drop its reliance on section 43 – prejudice to commercial interest.

## **Scope of the case**

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11. The complainant contacted the Commissioner 8 May 2017 to complain about the way his request for information had been handled. At this stage the Department had not provided a response to the complainant’s request for an internal review so the Commissioner contacted the Department and advised it to do so. Following the completion of the internal review the complainant remained dissatisfied with the way his request had been handled and so contacted the Commissioner again on the 3 July 2017 to set out his concerns.
12. The complainant was concerned over the time it took the Department to deal with his request and its reliance on sections 36 and 43 to withhold the requested information. Even if these exemptions were engaged the

complainant argued that the public interest would favour the disclosure of the information. In respect of the Department's reliance on section 42 – legal professional privilege, the complainant recognised the importance of maintaining the convention that individuals should be free to consult with their legal advisers in confidence. He therefore asked the Commissioner to consider whether the information withheld under section 42 did attract legal professional privilege but, if it did, he did not wish to challenge the public interest in maintaining the exemption.

13. During the course of the Commissioner's investigation the Department dropped its reliance on section 43, but cited sections 41 – information provided in confidence and section 40 – personal information to withhold some of the information. The Commissioner therefore considers that the issues to be decided are whether the Department breached section 10 in respect of the time it took to provide an initial response to the request and whether any of the exemptions cited can be relied on to withhold the actual information. If the Commissioner is satisfied that section 42 is engaged she will accept that the info to which that exemption has been applied can be withheld and not go onto look at the public interest.
14. After considering the time the Department took to respond to the request the Commissioner will look at section 36, as this exemption has been applied to all the withheld information.

## **Reasons for decision**

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### **Section 10 – Time for compliance**

15. Section 10 of FOIA states that a public authority is obliged to comply with a request within 20 working days of its receipt. In this case the request was made on 7 October 2016 and not responded to until 7 December 2016. This is a period of 43 working days which is far in excess of the 20 working days set out in the Act. The Department has therefore breached section 10 of the Act.
16. The Commissioner will consider the time it took the Department to conduct the internal review under Other Matters.

### **Section 36 – prejudice to the conduct of public affairs**

17. So far as is relevant, section 36(2) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure
  - (b) would or would be likely to inhibit:
    - (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purpose of deliberation, or

(c) would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.

18. Section 36(2) contains three separate exemptions. From the submissions made to the government ministers and the explanations provided by the Department the Commissioner understands that each of the three section 36 exemptions have been applied to all the withheld information. Section 36 is unique in that its application depends on the qualified person being of the opinion that the inhibition, or prejudice envisaged would, or would be likely to occur. In determining whether the exemptions are engaged the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given and
  - Consider whether the opinion was reasonable
19. In this case two separate opinions were sought. This is because in its original response to the request on 7 December 2016 the Department refused the first part of the request under section 14(2), on the basis that it was a repeat request, and only the second part of the request, which both parties have referred to as the 'meta request', was refused under section 36. At the internal review stage the Department realised that section 14(2) could not be relied on as it can only be applied where a previous request had been complied with, i.e. where the requested information had been provided. It therefore sought a second opinion from the qualified person which covered not only the meta request, but also the first part of the request.
20. For government departments any minister of the crown may act as the qualified person. The Department has provided the Commissioner with copies of the submissions made to the relevant government ministers involved and explained the process that was followed. The first opinion, which was related to the meta request, was sought from Lord Prior, the then Parliamentary Under Secretary of State for Health. He provided his opinion on 7 December 2016, i.e. the date the request was initially refused. That opinion was that all three limbs of section 36 were engaged on the basis that the inhibitions or prejudice 'would' occur. The second opinion was provided during the internal review on 26 May 2017 by the then Parliamentary Under Secretary for Public Health and Innovation, Nicola Blackwood. She too was of the opinion that all three

limbs of section 36 were engaged on the basis that the inhibitions or prejudice 'would' occur. The Commissioner is therefore satisfied that the first three requirements of section 36 as set out in paragraph 18 above have been met.

21. The next step is consider the reasoning which informed these opinions and determine whether they were reasonable. When considering reasonableness the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
22. The exemption can be engaged on the basis that the inhibition or prejudice either 'would' or 'would be likely' to occur. It is clear from records provided by the Department that the qualified person considered the inhibition and prejudice envisaged 'would' occur.
23. The information consists of a very considerable number of email chains, many of which have attachments to them. The chains captured by the first part of the request, i.e. for information on how the Department responded to the concerns that were raised by the Vote Leave Campaign's use of the NHS logo, discuss the Department's initial response to the issue and continue with discussions of what options are available to the Department to address the issue. These include email conversations with National Health Service England (NHSE), which had a shared interest in the matter, the Department's own legal advisers and other government departments with an interest in the issue. The second part of the request, the meta request, captures email chains discussing the sensitivity of that information together with which exemptions could be used to protect it from disclosure. As a consequence the withheld information includes many examples of chains which contain both emails offering advice and others seeking, or providing views for the purpose of deliberation. The Commissioner also notes that amongst the chains are some which simply deal with the arrangements for handling particular issues, for example arranging meetings or chasing response to queries or contributions to the various debates.
24. The Commissioner will start by looking at the exemptions provided by section 36(2)(b)(i) and (ii). As these two exemptions are closely related and because of the nature of the information and the way most of the emails are sent simultaneously to a number of colleagues it makes sense to consider the application of both exemptions at the same time.

**36(2)(a) – inhibition to the free and frank provision of advice and (b) – the inhibition of free and frank exchange of views for the purpose of deliberation.**

25. The first part of the request seeks information held in respect of the concerns raised over the Vote Leave Campaign's use of the NHS logo during the referendum. The submission provided to the qualified person included the Department's arguments for applying the exemption together with, what is described as a full description of the requested information. Having viewed the submission the Commissioner accepts the description provided to the qualified person fairly characterises the information in question. The qualified person was not however provided with any arguments against the application of the exemption. The Department has argued that it is important that officials feel able to have candid discussions, offering views and advice on the handling of matters such as the use of the NHS logo which are intrinsically linked to sensitive political issues such as Brexit. The use of the logo was controversial and the UK's decision to leave the European Union remains a sensitive issue. The Department has said that when an election, or referendum is taking place it is not uncommon for unexpected issues to arise which, because of the timeframe of the election or referendum, require urgent attention. In such situations the Department argues it is important that officials and stakeholders feel able to contribute fully to resolving the issue without concern that their input will be disclosed to the public in the future. To do so would, it is argued, lead to a chilling effect whereby officials were reluctant to provide their views or advice when similar situations arose in the future.
26. Although the Commissioner is usually sceptical that disclosing information would have a pronounced chilling effect there are grounds for considering that such an effect would occur in this instance. This is due in part to the political sensitivities surrounding the referendum and the fact that decisions were required within the limited time span of the referendum campaign. Therefore the Commissioner accepts that it is reasonable for the qualified person to hold the opinion that disclosing the requested information would make officials more cautious in the future. This is despite the fact that the at the time the qualified person's opinion was sought she was not provided with any counter arguments; the Commissioner considers it safe to assume that the qualified person would be well aware of the issues around the Vote Leave Campaign's use of the logo and the political concern that this generated.
27. It should be noted that the information to which section 36(2)(b) has been applied to includes requests for, and the provision of, legal advice in respect of the available options to prevent a potential trade mark infringement by the Vote Leave Campaign. The Department has also applied section 42(2) to this information on the basis that it attracts legal professional privilege. In terms of the application of section

36(2)(b)(i) and (ii) the Commissioner finds the qualified person had strong grounds for holding the opinion that the disclosure of this legal advice information would cause a chilling effect. When seeking or providing such advice it is vitally important that the party seeking the legal advice feels able to fully air their concerns and that their legal adviser feels able to provide robust advice, which may at times include identifying any weaknesses in their client's position. The Commissioner accepts that concern such advice may be released in the future could inhibit the candour of the discussion between lawyer and client.

28. The exemptions provided by section 36(2)(b) have also been applied to all the information captured by the second, the 'meta', part of the request. This is the part that deals with how the Department handled the complainant's original request. The original request was made on 26 June 2016, only three days after the referendum had taken place and there were obviously still political sensitivities around the results and how the two campaigns had been run. This in turn would have increased the sensitivity surrounding the disclosure of any information relating to either of those campaigns. Bearing in mind these sensitivities the Department has argued that disclosing information on how it dealt with a request for information about a controversial element of the Vote Leave campaign would invade the safe space which officials require when making decisions. It also argued that disclosing such information would have a profound chilling effect on future discussions of similarly sensitive issues, i.e. that officials would be more guarded when contributing to future decision making. The Commissioner notes that the qualified person was provided with samples of the withheld information and some, albeit limited, counter arguments to the application of the exemptions. The Commissioner is satisfied that the opinion was not an unreasonable one.
29. As with the first part of the request, the exemptions provided by section 36(2)(b) have been applied to information which the Department is also withholding under section 42 on the basis that it is capable of attracting legal professional privilege. As before, there is added strength to the argument that disclosing such information would have a chilling effect and therefore for accepting the qualified person's is a reasonable one.

### **Public interest test**

30. The exemptions provided by section 36(2)(b) are subject to the public interest test. This means that although the exemptions are engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in its disclosure.
31. In assessing the public interest in maintaining the exemptions the qualified person's opinion that the exemptions are engaged carries some



weight, particularly when the opinion given was that the inhibitions envisaged would occur, rather than only being likely to occur. Having accepted that the inhibitions cited would occur the Commissioner will consider the severity, extent and frequency of that prejudice under the public interest test.

32. The Department has argued that there is a clear public interest in ensuring safe space for officials to discuss issues freely and frankly in the knowledge that the contents of those discussions will remain private. To disclose information in the face of these expectations, it argues, would create a chilling effect where officials felt unable to provide frank advice and views over concerns that those communications could be made public in the future.
33. The Commissioner accepts the need for officials to have safe space in which to make decisions. However when giving weight to this argument it is important to consider whether the decision making process in question had been completed. The Commissioner acknowledges that both elements of the request relate in broad terms to the UK's exit from the European Union. However to argue that whilst that exit process is still ongoing, any information relating to that issue in any way should also be regarded as live information takes too wide an approach.
34. The Commissioner considers that the request captures information on two discrete decision making processes. The first part of the request concerns the decision on what action is necessary to protect the use of the NHS logo. The second is on how to respond to the original request and the sensitivity of the information captured by the original request. Regarding the first part of the request, the Commissioner considers that at the time the current request was made, 7 October 2016, the immediate risk of the misuse of the NHS logo by the Vote Leave Campaign had passed, the EU referendum had taken place and internet searches show that the Vote Leave Campaign as an actual legal body ceased to exist in September 2016. Therefore there are grounds for arguing that the decision making process in respect of what action was required had been taken by the time of the current request. However having viewed the information itself the Commissioner recognises that the debate that was had over the use of the logo, the options available to the Department for preventing infringements of its trade-marks and when it was appropriate to take action, would be relevant to future infringements if they were to occur in the future, i.e. the more general issue of the need to protect its trade marks is an ongoing issue for the Department and the NHS. This is particularly true when it is remembered that the part of the withheld information includes legal advice.
35. The need for safe space is often confined to internal discussions only and, as the complainant is aware through the limited disclosures already

made to him, some of the discussions around the potential misuse of the NHS logo involved NHS England. The Commissioner does not consider this necessarily diminishes the need for safe space that was required, or the chilling effect that would flow from disclosing the requested information. This is because the Department and NHS England shared a common interest in protecting the NHS trade mark and needed to collaborate when considering how best to tackle the problem.

36. In respect of the second part of the request, the meta request, the decision to refuse the complainant's original request may have been taken by the time the current request was made. However the Commissioner agrees that the issue was still a live issue. By making his current request the complainant may have signalled that he did not intend to appeal the refusal of his original request, but the current request is clearly a continuation of the complainant's attempts to access information on the potential misuse of the NHS logo. It follows that even with the passage of time, some of the issues considered when handling the original request would still be relevant to handling the current request. Furthermore it would not be unreasonable for the Department to consider the possibility of the current request being appealed to the Commissioner and possibly the Tribunal. Therefore the Commissioner fully accepts the information requested in the meta request related to a live issue and that therefore safe space is required as the Department continues to deal with the current request.
37. The Department has also claimed that disclosing the requested information would have a chilling effect on the candour of future discussions. As stated earlier the Commissioner is usually sceptical of such arguments. The complainant has also reminded the Commissioner of the research undertaken by the Constitution Unit at University College London<sup>1</sup> which found there was a lack of evidence of a real chilling effect. The Commissioner's position is that public officials are expected to provide impartial, robust advice and opinion when required to and would not easily be deterred from doing so. However she also recognises that concern over future disclosure does have the potential to cause a chilling effect. How great that effect will be depends largely on sensitivity of the actual information to be disclosed and how recent the decision making process to which it relates was. In this case, in respect of the information on the use of the trade mark, the Department has to be constantly on the guard against potential misuse and the information would be relevant to any future cases that arose. The request handling issue is still live and therefore, particularly in respect of the meta request, the Commissioner considers the chilling effect argument carries some weight.

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<sup>1</sup> The Impact of the freedom of Information Act on Central Government in the UK. Does FOI work? Hazel R, Worthy B, Glover M.

38. The public interest in maintaining the exemption is increased further due to the fact that the requested information includes some legal advice. It is an important part of good decision making that officials are able to fully explore the issue under consideration. This may involve fully examining the strengths and weaknesses of its own position so that experts in the relevant field, in this case its lawyers, can get to grips with the problem and provide the best advice possible.
39. The Commissioner has also considered the Department's argument that the need for safe space was especially strong in this case because the decision making process in respect of the NHS logo related to, and took place during, the EU referendum campaign. The Department has argued that during elections and referendums unexpected and difficult issues will often arise which require frank discussions in order to resolve within tight time frames. The complainant is sceptical of this argument, countering that it is the nature of government that some advice and views need to be expedited quickly and that the information's relationship with what was then the ongoing referendum campaign does not give any additional weight to maintaining the exemption. The Commissioner is more sympathetic the Department's position. The ongoing referendum would have heightened the political sensitivity of the issue and created a more pressurised environment in which to make decisions.
40. Finally the Department has argued that disclosing the information would have a negative impact on record keeping. It considers that the day to day business of government is conducted in the expectation that internal discussions will remain confidential. The risk of information revealing the content of such discussions being disclosed would, it argues, lead to written decision making and ministerial input being replaced by 'off the record meetings'. This it considers would inevitably result in poorer decision making. The Commissioner notes that the right to request official information under the FOIA had existed for nearly twelve years by the time the request was made and therefore the Commissioner is surprised by the Department's view that its officials still have an expectation that their internal discussions would automatically remain confidential rather than recognising that information would be disclosed unless there were clear grounds for withholding it. The Commissioner also considers that the obvious risk that poorer record keeping would have an adverse effect on decision making would mean officials would be reluctant to adopt such an approach.
41. There is some information however that is of a far less sensitive nature. Having viewed the information caught by the first part of the request, i.e. that relating to how the Department handled the issue of the Vote Leave Campaign's use of the NHS logo, the Commissioner has identified some information which does not contain any meaningful expression of views or advice. This information consists of factual reports regarding

the volume of complaints received by NHS England and the Department. As the contents of such reports is not dependant on the willingness of officials to discuss issues with candour, nor is it likely that officials could address such issues without collating such information, the Commissioner finds there is little public interest in withholding such information to either preserve safe space or prevent any chilling effect.

42. Some of the information captured by the meta request regarding the Department's handling of the original request is also of a less sensitive nature. The information in question consists of email exchanges that simply reveal the procedures followed for dealing with the request, the breadth of the consultation carried out by the Department and emails chasing responses to those consultations. They do not provide any significant details of the substance of the consultation. As such the public interest in maintaining the exemption in respect to this information is very much reduced. It does however help rough out a partial time line of the request handling process.
43. The Commissioner will now look at the public interest in disclosing the requested information. The Department has recognised that there is a general public interest in transparency of discussions within a public authority and that although the EU referendum was over at the time of the request, the issues remain live and open to debate and scrutiny. The complainant has also picked up on this point arguing that the use of the NHS logo by the Vote Leave Campaign was understood by many to give the impression that the claims presented by the campaign were in some way officially endorsed by the NHS and that this was persuasive element of the campaign. The Commissioner recognises that the funding of the NHS is a major concern of the electorate and that claims regarding the amount of additional money that could be freed up for use within the NHS was a major plank of the Vote Leave campaign. Exactly how important the use of the logo was in reinforcing these arguments may be more debateable. Nevertheless there is a clear public interest in understanding what steps the Department and NHS England took to counter any possible confusion caused by the use of the logo in the context of such an important democratic exercise as the EU referendum, particularly considering the importance of the referendum on the long term future and prosperity of the UK.
44. There is also a public interest in understanding the Department's ability to protect the NHS logo from misuse and how competently the Department handled the issue and holding the Department accountable for its performance in this matter.
45. In respect of the meta request there is a public interest in disclosing information which would allow scrutiny of how the Department has approached its statutory duties under the FOIA. There is a real value in allowing the public to understand how such requests are dealt with. This

is particularly so when the information sought in the original request relates to an issue that was both current and very controversial at the time of the original request. In the circumstances of this case it is important that the public are able to scrutinise how long the Department took to deal with the original request and satisfy themselves as to the justification for any delays.

46. Therefore there is a value in disclosing information that would reveal the breadth of the consultations which the Department considered appropriate and the time it took to carry out those consultations. This is not simply because the complainant has raised concerns over the length of time it took the Department to respond to the request but more generally disclosing such information would give an insight into how sensitive the Department considered the information to be at the time the original request was received and the level of work such request may generate.
47. Having considered both the arguments for withholding the information and the arguments for disclosing the information the Commissioner finds that in respect of all but the more factual information on the number of complaints received about use of the NHS logo and the more procedural information referred to in paragraphs 41 and 42 above the public interest in favour of withholding the information is greater than that in favour of disclosure. This is primarily due to the fact that some of the information includes legal advice which is still relevant to the Department's on going policing of use of the NHS logo by third parties. It is also significant that the request relates to decisions that were taken at a very politically sensitive time when perhaps officials had a greater need to be completely candid with one another. In respect of the information captured by the meta request the Commissioner considers this information to relate to an issue that is still live due its relevance to the current request. The Commissioner finds that Department is entitled to rely on the exemptions provided by section 36(2)(b) to withhold the majority of the requested information.
48. However in respect of the more factual and the more procedural information the Commissioner has found that the public interest in maintaining these two exemptions is very much reduced. The fact that the information does provide some transparency over the Department's handling of the NHS logo issue and does provide some, albeit limited indication of the request handling process in respect of the original request is therefore sufficient for the public interest to favour disclosure.

**Section 36(2)(c) – otherwise prejudice the conduct of public affairs**

49. Section 36(2)(c) provides an exemption in respect of information the disclosure of which would 'otherwise' prejudice the conduct of public

affairs. The use of the term 'otherwise' means that it can only be applied to some adverse effect not covered by the other two exemptions provided by section 36(2). Furthermore in *McIntyre v Information Commissioner and Ministry of Defence* (EA/2007/0068 – 4 February 2008) the Tribunal agreed with the Commissioner that section 36(2)(c) is intended for situations when information needs to be withheld in the interests of good government, but for which no other exemption applies.

50. The complainant has argued that the Department has failed to identify what this other means of prejudicing public affairs is. Having looked at the refusal notice and the internal review letter issued to the complainant the Commissioner notes that they both to focus on the exemptions provided by section 36(2)(b) and fail to explain in any detail the engagement of section 36(2)(c).
51. In its submission to the Commissioner the Department has not isolated any specific arguments in respect of the engagement of section 36(2)(c). Nevertheless the Commissioner has attempted to identify those arguments which may relate some form of prejudice to public affairs that, at least at first glance, would not be protected by the application of other, more specific, exemptions. The Department argues that to provide this meta data would in effect reveal information relevant to the Department's consideration of the present request. This would prejudice its ability to defend its position in respect of this request if the complainant was to appeal its refusal of the present request to the Commissioner, as he has done, or at any subsequent Tribunal. However when analysed in more detail the Commissioner considers this argument is really an expansion of its grounds for withholding information under the inhibition to the free and frank discussion of issues provided by section 36(2)(b). It does not provide any ground for relying on section 36(2)(c).
52. The Department has also argued that disclosing any of the information captured by the request, i.e. either both the information on its handling of the alleged misuse of the NHS logo and information on how it dealt with the original request for that information, would spark further debate that would have been unhelpful. It is not clear in what way further debate of the issues would be unhelpful, if it is a reference to the need for safe space, or the political sensitivity of disclosing information relating to the referendum, these arguments have also already been considered under section 36(2)(b). Again this argument does not provide a ground for relying on section 36(2)(c).
53. The Department's submissions to the qualified person contain some further arguments which the Commissioner has dealt with in a confidential annex provided exclusively to the Department. In the open part of this notice the Commissioner is only prepared to say that the arguments presented relate to means of prejudice not covered by other

exemptions. The Commissioner does not consider one of the grounds to be particularly strong. In the Commissioner's view the other ground does not form a basis for applying the exemption.

54. Finally the Department appears to have argued that as disclosing any of the requested information would cause a profound chilling effect, this would, in turn, prejudice the conduct of public affairs. The Commissioner accepts the principle that if there was a chilling effect this would have a negative impact on government decision making. However this is the very harm which the exemptions by section 36(2)(b) are designed to protect against. Therefore the Commissioner does not accept this ground would support a reasonable opinion that section 36(2)(c) is also engaged.
55. Having considered what she understands the Department's grounds for relying on section 36(2)(c) the Commissioner finds that only one of them relates to a valid ground for applying the exemption. That one ground is discussed in the confidential annex. Although the Commissioner considers the arguments weak she does not consider it to be so weak as to render the qualified person's opinion unreasonable. The exemption is engaged.

#### **Public interest test**

56. The Commissioner is unable to set out the public interest arguments in favour of maintaining the exemption on the grounds discussed in the confidential annex in the public version of this notice. As already stated though she considers the grounds are weak. As a consequence the public interest arguments in favour of disclosure, which are the same as those discussed when considering the public interest in respect of section 36(2)(b) carry far greater weight. The Commissioner finds that after applying the public interest test the Department is not entitled to rely on section 36(2)(C) to withhold any of the requested information.

#### **Conclusions on section 36**

57. The Commissioner has found that section 36(2)(b) can be relied on to withhold all the requested information apart from a limited amount of information which mainly relates to either the factual information on the number of complaints received about the NHS logo and some of procedural aspects of the Department's handling of the original request. She has also found that section 36(2)(c) cannot be relied on to withhold any of this information. Before ordering its disclosure the Commissioner needs to consider whether any of this information has also been withheld under any of the other exemptions cited by the Department.

#### **Approach taken in the remainder of the notice**

58. One of the documents not protected by either section 36(2)(b) or (c) has also been withheld under section 42, legal professional privilege. The Commissioner will next look at whether that exemption applies and, if so, whether it can be maintained in the public interest. When looking at the application of section 42 in relation to this document the Commissioner will also take the opportunity to comment on the application of this exemption to the requested information more generally. The Commissioner will conclude by looking at whether any of the information that is still to be disclosed following consideration of section 36 and 42 contains personal data which should be withheld under section 40 on the basis that its disclosure would breach the Data Protection Act 1998 (DPA). During the Commissioner's investigation the Department also cited section 41, information provided in confidence, as the Commissioner has already found that the information to which this exemption has been applied is exempt under section 36, it is unnecessary to consider its application in this notice.

### **Section 42 – legal professional privilege**

59. Section 42 states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt.
60. The exemption has been applied to a large number of the email chains and attachments captured by both parts of the request including one of those which the Commissioner has found is not exempt under section 36.
61. In broad terms legal professional privilege protects the confidentiality of communications between a client and their legal adviser. This allows the client to set out the issues on which they need advice as fully as possible and the legal adviser to provide full and frank advice which may, on occasions, include the weaknesses of their client's position. There are two types of legal professional privilege. Litigation privilege will apply where litigation is in prospect or contemplated. Legal advice privilege will apply where no litigation is in prospect or contemplated.
62. For the information to be capable of attracting legal professional privilege the information must form a communication which has been made for the dominant purpose of seeking or providing legal advice. The term 'dominant' is taken to mean the 'main' purpose for which the information was created as opposed to the sole purpose.
63. The Commissioner will start by looking at the one document that she has found cannot be withheld under section 36 but to which section 42 has also been applied. The document in question is one relating to the meta request. Although included in the bundle of information identified by the Department as being withheld under section 42 the



Commissioner cannot identify within the contents of the email which suggests it was seeking or providing legal advice. Nor does it appear to have been copied into any legal adviser to keep them abreast of the progress of the request handling process or to offer them the opportunity to comment on the matter to which it relates. Therefore the Commissioner finds that this one document does not attract legal professional privilege. Subject to the application of section 40, personal information, this email should be disclosed.

64. The Commissioner will now look more broadly at the Department's application of section 42 to the information that she has already found to be exempt under section 36. In respect of the legal communications captured by the first part of the request the Commissioner i.e. that relating to the Departments handling of the potential misuse of the NHS logo, the Commissioner considers that there was a realistic prospect of litigation and therefore there are grounds for considering whether information is capable of attracting litigation privilege.
65. Both the Department and NHS England had a common interest in tackling the potential trade mark infringement by the Vote Leave Campaign and during the email exchanges advice was shared and became interwoven into the email dialogue between the two bodies and the discussions within the department itself. This has made it very difficult to unpick exactly which lawyer was acting for which party in respect of each individual communication and therefore to establish the lawyer/client relationship in respect of each communication. Notwithstanding this, due to the common interest both the Department and NHSE had protecting the NHS trade mark the Commissioner is satisfied that the communications were made for the dominant purpose of establishing their legal position in respect of this matter.
66. Furthermore the Commissioner is also satisfied that in the circumstances of this case these communications were made on a clear understanding that they were confidential. The Commissioner therefore finds that the communications captured by the first part of the request that have been withheld under section 42 are capable of attracting legal professional privilege and in particular litigation privilege. The Commissioner notes this information would include any information that may be held on the merits of the Vote Leave Campaign's claims that its use of the NHS logo would not infringe the trade-mark. The Commissioner understands that this is information which the complainant is particularly interested in.
67. The situation regarding the application of section 42 to the meta request is less complicated. All the legal advice on the handling of the complainant's original request is internal to the Department and it is relatively easy to establish the client/lawyer relationship. It is also clear from the nature of the communications between the Department and its

lawyers that they were made for the dominant purpose of seeking or providing legal advice. The Commissioner is satisfied that the information remains confidential to the Department. The information could attract advice privilege. The exemption is engaged.

### **Public interest test**

68. Section 42 is subject to the public interest and although the complainant has not challenged the application of the public interest test to any information which the Commissioner is satisfied is privileged, the Commissioner will briefly consider the matter.
69. It is accepted by the Commissioner and the Tribunal that there is an inherent public interest in protecting the principle of legal professional privilege. This is necessary to preserve the right of both natural and legal persons to seek legal advice in order to defend their rights. To obtain robust legal advice a client must be able to be completely honest with their legal adviser and that adviser must be free to be completely frank as to the strengths and weaknesses of their client's position. This would not be possible if the client believed there was a risk of these communications being disclosed to their disadvantage at a later date.
70. As well as this inbuilt public interest the Commissioner is satisfied that the advice relates to two issues that were still live in that the advice about the logo is relevant to the continuing need to protect the NHS trademark and the advice on the Department's handling of the original request is relevant to the current request. Added to this is the fact that the use of the NHS logo was a politically controversial issue and this makes the advice more sensitive. There is a significant public interest in preserving the principle of legal professional privilege in these circumstances.
71. The public interest in disclosing the information is the same as that discussed under section 36. In addition there is a public interest in disclosing information that would reveal the extent of any obstacles that the Department may have encountered when dealing the potential trade mark infringement. This is particularly important as it is clear that those who had concerns over the Vote Leave Campaign's use of the logo were frustrated by the apparent lack of action from the Department. It is important in such situations that the public have access to information which would allow them to reach an informed view on whether the Department took appropriate action. There is also a public interest in the public having confidence in the quality of the advice that was available to the Department.
72. Even though there are some weighty public interest arguments in favour of disclosure the Commissioner finds that the public interest in favour of maintaining the exemption is greater. This is in part because of the

inherent value in protecting the principle of legal professional privilege and the fact that the advice related to live issues.

73. Having considered both sections 36 and 42 the Commissioner has found that neither exemption provides grounds for withholding a limited amount of the requested information. Before ordering the disclosure of this information the Commissioner will consider whether any of it is exempt under section 40.

#### **Section 40 – personal information**

74. Section 40(1) provides that information which is the personal data of the person making the request is exempt. To the extent that the information to be released contains the name of the complainant the Department would be entitled to withhold that information from the disclosure. Although the Commissioner would expect the Department to apply section 40(1) strictly to any information it may disclose to the wider public, it may wish to adopt a more pragmatic approach when disclosing any information directly to the applicant.
75. Section 40(2) provides that the personal data of someone other than the person making the request is exempt if its disclosure would breach any of the data protection principles set out in the DPA. The Commissioner understands that the Department considers that to disclose the personal data of officials below the grade of senior civil servant would be unfair and so breach the first data protection principle which states that the processing of personal data shall be fair and lawful.
76. 'Fairness' is a difficult concept to define. It involves consideration of:
- The possible consequences of disclosure to the individual.
  - The reasonable expectations of the individual regarding how their personal data will be used.
  - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

77. It is argued that junior officials would have a reasonable expectation that, due to their less public facing role, their personal information will not be disclosed into the public domain. To disclose their information in the face of such expectations would be unfair.
78. The Commissioner considers that the expectations of these officials would, in part, be shaped by the provisions of the FOIA. There should be recognition amongst public servants that some information about their

working life could be disclosed in response to a request. This will however depend on the particular circumstances.

79. The Commissioner accepts that these officials do not have a public facing, or high profile role and that this would lead them to believe that in the normal course of events their names and contact details would not be placed in the public domain.
80. There are no obvious reasons to believe that disclosing their association with the issues to which the request relates would have any particularly detrimental consequences for them. However disclosing their names and contact details would not assist the public in understanding the position adopted by the Department in this matter. Therefore on balance the Commissioner finds that the disclosure would be unfair and so breach the first principle of the DPA. Section 40(2) is engaged. The Department is entitled to withhold the names and contact details of the staff involved in the email exchanges. However this does not extend to details included in the email addresses or elsewhere within the emails which reveal the department or business area in which that individual works. It is important that such information is disclosed to provide the complainant with any meaningful understanding of the breadth of consultations that were conducted when dealing with his original request.
81. Finally, some of the withheld information contains the complaints that were made about the Vote Leave Campaign's use of the NHS logo. The Commissioner has viewed these complaints and notes that where they form part of the information to be disclosed those complaints were already anonymised by the Department before circulating them internally. However in the event that any of the information to be disclosed does still contain information capable of identifying the individuals who made the complaints, the Department is required to remove those identifiers. Clearly to disclose the identity of members of the public who raised their concerns over the use of the NHS logo had no expectation that their personal data would be disclosed and to do so in the face of such expectations would be unfair.
82. The Commissioner has provided the Department with a confidential annex which not only deals with those section 36(2)(c) arguments that cannot be included in the open version of this notice, but also sets of the info to be disclosed .

## **Other matters**

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83. Although not forming part of the formal decision notice the Commissioner uses this 'Other Matters' section to highlight issues of concern that have arisen during his investigation.

84. One of the issues raised by the complainant was the length of time it took the Department to deal with his request. The lateness in providing him with an initial refusal notice has already been dealt with under section 10. However there is no statutory deadline for dealing with requests and failure to conduct an internal review cannot therefore be dealt with as a breach of the Act. Nevertheless the Commissioner has issued guidance which makes it clear that she expects that in most cases a public authority should be able to complete an internal review within twenty working days. In even the most complicated cases, involving complex public interest arguments, the Commissioner would expect a public authority to carry out the review in no more than forty working days. In this case the complainant asked for an internal review on 17 January 2017. Forty working days from that date would be the 14 March 2017. The Department did not complete the internal review until 1 June 2017. This is clearly well outside the forty days set out in the Commissioner's guidance.
85. Finally the Commissioner had difficulty in obtaining responses to her enquiries and eventually had to serve an information notice on the Department in order to obtain the answers she required.

## **Right of appeal**

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86. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

87. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

88. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## **Signed**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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